

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

KEVIN BURTON,

Plaintiff,

No. C 07-4967 PJH (PR)

vs.

**ORDER OF SERVICE**

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION;  
DIRECTOR, CDCR; MIKE EVANS,  
Warden; Lieutenant KRENKE; Sergeants  
RAMIREZ, BRUNCATO, and O'KENNO;  
Correctional Officers CORRASCO,  
SILVA, CONTRERAS, PHILMON,  
WILSON, HORRENCE, PEREZ,  
GARCIA, GRAYWALD, and  
GOODHUME; MTAs CAUNTAY,  
GARCIA, ZIEGLER, AND MOSS; and  
DOES 1-50,

Defendants.

Plaintiff, a prisoner at the San Diego Central Jail, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

Venue is proper in this district because the complaint involves events at Salinas Valley State prison, which is in this district. See 28 U.S.C. § 1391(b).

**DISCUSSION**

**A. Standard of Review**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may

1 be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at  
2 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police*  
3 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

4 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of  
5 the claim showing that the pleader is entitled to relief." "Specific facts are not necessary;  
6 the statement need only "give the defendant fair notice of what the . . . claim is and the  
7 grounds upon which it rests."" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations  
8 omitted). Although in order to state a claim a complaint "does not need detailed factual  
9 allegations, . . . a plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief'  
10 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
11 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief  
12 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65  
13 (2007) (citations omitted). A complaint must proffer "enough facts to state a claim for relief  
14 that is plausible on its face." *Id.* at 1986-87.

15 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
16 elements: (1) that a right secured by the Constitution or laws of the United States was  
17 violated, and (2) that the alleged deprivation was committed by a person acting under the  
18 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

## 19 **B. Legal Claims**

20 Because plaintiff refused to be housed with a cellmate, he was placed in a "holding  
21 cage." He says that the cage is four feet long by two feet wide and is eight feet high. It is  
22 constructed out of metal honeycomb, so the occupant is always visible. The cage has  
23 neither overhead light nor sanitary facilities. Because of the size of the cage, plaintiff  
24 alleges it was not possible to sit or lie down. He was allowed only boxer shorts and socks  
25 for clothing, but a guard who is not a defendant gave him a sheet to wrap about himself on  
26 the first night. When he was put into the cage there was milk carton with urine in it in the  
27 cage and the sides were caked with feces. A guard removed the carton but nothing was  
28 done about the feces. He was allowed out briefly twice a day to go to the bathroom, but

1 was not allowed to clean himself or exercise.

2 Plaintiff was kept in the cage for eight days and seven nights. He filled out sick-call  
3 slips at least twice because his legs were swelling and he was having back trouble. No  
4 medical care was provided. He suffered cramps in his legs and back. By the end of his  
5 confinement he was unable to sleep because of the pain and was hallucinating.

6 Plaintiff has pleaded nine causes of action; the first two are federal Eighth  
7 Amendment claims, the others are state-law claims. The first through seventh causes of  
8 action are against "all defendants." The eighth claim, headed "Negligent Training or  
9 Supervision," is against the CDCR, the director of the CDCR, and Warden Evans. The  
10 ninth claim, headed "respondeat superior," is against the CDCR.

11 Plaintiff alleges that all of the defendants except the CDCR, the director of the  
12 CDCR, and Warden Evans were directly aware of his situation. The federal and state law  
13 claims against defendants other than the CDCR, the director, and Evans contain  
14 allegations sufficient to require a response from them.

15 The Eleventh Amendment prevents the CDCR, which is a state agency, from being  
16 sued in federal court. See *Simmons v. Sacramento County Superior Court*, 318 F.3d  
17 1156, 1161 (9th Cir. 2003) (11th Amendment bars suit against state superior court and its  
18 employees); *Bennett v. California*, 406 F.2d 36, 39 (9th Cir. 1969) (California Adult  
19 Authority and California Department of Corrections not persons within meaning of Civil  
20 Rights Act); see also *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 541-  
21 42 (2002) (Eleventh Amendment bar includes state law claims brought against a state in  
22 federal court under the supplemental jurisdiction statute, 28 U.S.C. § 1367). All claims  
23 against the CDCR – state and federal – will be dismissed.

24 The claims which include as a defendant the "Director, CDCR," claims one through  
25 eight, are essentially John Doe claims. Because plaintiff requests only damages,  
26 substitution of the current director would not be appropriate. No further action will be taken  
27 on the claims against the director or the John Doe claims, but plaintiff should amend to add  
28 these defendants' true names if he learns them.

Plaintiff has not provided any factual allegations which would support the warden's liability on the first through seventh claims. As to the eighth claim, negligent training or supervision, plaintiff contends that Evans knew there was a lack of training or supervision that led to his confinement in the cage for a week. This is sufficient to require a response from Evans.

### CONCLUSION

1. For the foregoing reasons, all claims against defendant CDCR are **DISMISSED** with prejudice. Claims one through seven against Warden Evans are **DISMISSED** without prejudice.

2. The clerk shall issue summons and the United States Marshal shall serve, without prepayment of fees, copies of the complaint with attachments and copies of this order on the following defendants: Mike Evans, Warden; Lieutenant Krenke; Sergeants Ramirez, Bruncato, and O'Kenno; Correctional Officers Corrasco, Silva, Contreras, Philmon, Wilson, Horrence, Perez, Garcia, Graywald, and Goodhume; and MTAs Cauntay, Garcia, Ziegler, and Moss.

3. In order to expedite the resolution of this case, the court orders as follows:

a. No later than sixty days from the date of service, defendants shall file a motion for summary judgment or other dispositive motion. The motion shall be supported by adequate factual documentation and shall conform in all respects to Federal Rule of Civil Procedure 56, and shall include as exhibits all records and incident reports stemming from the events at issue. If defendants are of the opinion that this case cannot be resolved by summary judgment, they shall so inform the court prior to the date their summary judgment motion is due. All papers filed with the court shall be promptly served on the plaintiff.

b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the court and served upon defendants no later than thirty days from the date the motion was served upon him. Plaintiff must read the attached page headed "NOTICE -- WARNING," which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir.

1998) (en banc), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

If defendants file an unenumerated motion to dismiss claiming that plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff should take note of the attached page headed "NOTICE -- WARNING (EXHAUSTION)," which is provided to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).

c. If defendants wish to file a reply brief, they shall do so no later than fifteen days after the opposition is served upon them.

d. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the court so orders at a later date.

4. All communications by plaintiff with the court must be served on defendants, or defendants' counsel once counsel has been designated, by mailing a true copy of the document to defendants or defendants' counsel.

5. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) is required before the parties may conduct discovery.

6. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court informed of any change of address by filing a separate paper with the clerk headed "Notice of Change of Address." He also must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

**IT IS SO ORDERED.**

Dated: June 6, 2008.



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PHYLLIS J. HAMILTON  
United States District Judge

**NOTICE -- WARNING (SUMMARY JUDGMENT)**

If defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

**NOTICE -- WARNING (EXHAUSTION)**

If defendants file an unenumerated motion to dismiss for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions.

If defendants file a motion to dismiss and it is granted, your case will be dismissed and there will be no trial.